

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BENITO VASQUEZ,

Plaintiff,

V.

KITSAP COUNTY, KITSAP COUNTY TRANSIT,

Defendants.

CASE NO. C07-5576BHS

ORDER GRANTING
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

This matter comes before the Court on the motion for summary judgment filed by Defendant Kitsap County Transit. Dkt. 45. Also before the Court are the parties' responses to the Court's order to show cause regarding sanctions, Plaintiff's motion for extension of time (Dkt. 73), and Plaintiff's motion to continue trial (Dkt. 75).

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Employment With Kitsap County Transit

In October 2001, Mr. Vasquez submitted an application for employment as a Transit Operator with Kitsap County Transit (“Kitsap Transit”). In the “Education” section of the application, Mr. Vasquez responded to the question about college or university studies by writing “San Jose Community” and “San Jose State” and indicated that he had “completed” four years. Dkt. 47-2 at 2 (application for employment).

On April 12, 2002, Mr. Vasquez was hired as a new trainee in Routed Operations. He worked as a Routed Operator until he was terminated in March 2006. Dkt. 45 at 3.

1 In June of 2002, Mr. Vasquez claims he was the victim of an assault that caused
2 him serious physical, mental and emotional injury. Dkt. 1 at 2. Mr. Vasquez claims that
3 he was assaulted by Kitsap Transit employees James Robert Sellars, Charles Higgins, and
4 other John Does. Dkt. 1 at 2. No Kitsap Transit supervisors were present at the time of
5 the assault. Dkt. 1 at 3. According to Mr. Vasquez, Mr. Sellars had a history of
6 assaultive behavior. Dkt. 1 at 2-3. Kitsap Transit maintains that it never received a
7 complaint from Mr. Vasquez regarding the alleged assault. Kitsap Transit further
8 maintains that the employees alleged to have taken part in the assault vehemently deny
9 Mr. Vasquez's accusations. Dkt. 49 at 2 (Declaration of Per Johnsen).

10 **B. November 2004 EEOC Complaint**

11 In November 2004, Mr. Vasquez filed a charge with the Equal Employment
12 Opportunity Commission ("EEOC") solely against Kitsap Transit. The charge alleged
13 that certain female transit operators had informed Mr. Vasquez that they had been
14 sexually harassed by senior transit operators and supervisors. Mr. Vasquez asserted that
15 he spoke to his supervisor about the incident, the matter was dismissed, and he was
16 subsequently subjected to a hostile work environment by management and senior drivers.
17 Dkt. 45 at 3; *see also* Vasquez Dep. at 67:8-17. Kitsap Transit maintains that it never
18 received any report from Mr. Vasquez that other employees had been subjected to sexual
19 harassment. Dkt. 45 at 4. Kitsap Transit maintains that the only complaint received from
20 Mr. Vasquez was his allegation that senior drivers were "picking on" junior drivers, but
21 Mr. Vasquez would not identify the senior drivers.

22 On March 4, 2005, the EEOC issued a determination that it was unable to conclude
23 that the information obtained established a violation of the statutes. Dkt. 45 at 4.

24 **C. Allegations of Criminal Assault**

25 According to Kitsap Transit, in November or December of 2004, Mr. Vasquez
26 submitted a complaint to the Kitsap County Prosecuting Attorney in which he alleged he
27 was assaulted by other Kitsap County employees. Dkt. 49 at 2 (Declaration of Per

1 Johnsen). Kitsap Transit was contacted by the Kitsap County Sheriff's Office, which had
2 been asked to investigate the allegations. *Id.* Defendants maintain that the Kitsap County
3 Sheriff's Office investigator concluded that he was unable to find any evidence that Mr.
4 Vasquez had been assaulted or that he had reported the assaults to anyone at Kitsap
5 Transit. *Id.*

6 **D. Plaintiff's Allegations During 2005 Federal Lawsuit**

7 On June 2, 2005, Mr. Vasquez filed a complaint in federal court against Kitsap
8 County, Kitsap Transit, and several co-workers. *See* Dkt. 49-2 at 4 (complaint filed by
9 Mr. Vasquez). Mr. Vasquez alleged that he was subjected to a hostile or abusive work
10 environment because of sexual and racial harassment. *Id.* at 8. He also alleged various
11 state claims, including assault. *Id.*, 5-8. However, on May 16, 2006, Kitsap Transit's
12 motion to dismiss was granted on grounds of insufficient process and lack of jurisdiction.
13 Dkt. 45 at 5. The claims against all other Defendants were also dismissed. Dkt. 45 at 5.

14 According to the attorney who represented Kitsap County in Mr. Vasquez's 2005
15 action, Mr. Vasquez described the allegations of the 2002 assault during a court-ordered
16 September 2005 conference call. During this call, Mr. Vasquez stated at one point that he
17 "should have killed [Dennis Coleman, one of the alleged attackers] right there – that's
18 what the prick deserved." Dkt. 49-2 at 11 (Declaration of Rodney B. Younker). Mr.
19 Vasquez also allegedly finished his account of the assault by stating that when the fight
20 ended, his "first inclination was to go home, get my gun, go back and do some killing."

21 *Id.*

22 Mr. Vasquez has not denied making these statements. Rather, Mr. Vasquez
23 explained these statements as follows:

24 In a discovery conference I was asked about being assaulted in 2002
25 by the attorney for the union. My statements were clearly as to my state of
26 mind over 3 1/2 years prior to the conference and not intended to threaten
27 anybody. In fact, I have never threatened anybody at Kitsap Transit with the
exception to some statements while defending myself from assaults . . . I
believe Kitsap Transit intentionally exaggerated my statements in order to
retaliate against me as well to demonstrate to other employees what happens
28 to employees that [sic] reports any misconduct.

1 Dkt. 69 at 3 (Mr. Vasquez's declaration).

2 After learning of these statements, Kitsap Transit maintains that it immediately
3 placed Mr. Vasquez on paid administrative leave in order to ensure the safety of its
4 employees. Dkt. 49 at 3 (Declaration of Per Johnsen). Mr. Vasquez was told that the leave
5 would "remain in effect while the agency evaluates concern for your safety and that of
6 your fellow co-workers raised by allegations of violent altercations made in your federal
7 lawsuit." *Id.* Kitsap Transit then required Mr. Vasquez to undergo an evaluation of his
8 fitness for duty by Dr. Mark McClung, a psychiatrist. *Id.* Regarding the potential for
9 violence, Dr. McClung stated that "Mr. Vasquez does not exhibit or describe any
10 significant current distress, and does not display any decompensation in coping and
11 mental state that would acutely increase the risk of aggression." Dkt. 49-2 at 23 (letter
12 from Dr. McClung). Dr. McClung opined that Mr. Vasquez's "pattern and character . . .
13 of report[ing] of the incidents" was "consistent with willful fabrication, if the events he's
14 claiming are not factual." *Id.*

15 Apparently, Kitsap Transit informed several employees about Mr. Vasquez's
16 allegations and his statements concerning his desire to kill co-workers. In response,
17 several employees obtained protective orders against Mr. Vasquez. Dkt. 69, 6-29.

18 **E. Plaintiff's Report of Alleged Atrocities**

19 In response to discovery requests from the individual employees Mr. Vasquez had
20 sued for assault and battery, Mr. Vasquez revealed a "Report" that he said he drafted
21 beginning in 2003. Dkt. 48-2 at 2 (Declaration of Roy Harrington); *see also id.*, 15-40
22 (copy of "Report: Kitsap County Amalgamated Transit Union Campaign of assaults,
23 harassment, and hostile working conditions"). In his deposition, Mr. Vasquez testified
24 that he began writing the Report around December 2003. Dkt. 46-2 at 22 (deposition of
25 Benito Vasquez). The Report included many allegations of serious and offensive

1 misconduct by Kitsap Transit employees and managers.¹ Included in the Report were the
2 following allegations:

3 1. In his May 2002 entry, Mr. Vasquez alleges that his driver/mentor Matt
4 Matherly became very belligerent. Mr. Vasquez alleges that he observed Mr. Matherly's
5 inappropriate involvement with individuals Mr. Vasquez called "groupies." Mr. Vasquez
6 defined "groupies" as individuals who are "personally, socially, and in many cases
7 intimately involved with a driver." Mr. Vasquez claimed that he observed Mr. Matherly
8 and the "groupies" holding hands, hugging, kissing and touching private areas. Mr.
9 Vasquez further claimed that other senior drivers, including "Whitey, Mark Dawson, and
10 Doug Bauer" would also congregate with groupies. *Id.*, 23-24

11 2. In one of his June 2002 entries, Mr. Vasquez claimed that he was assaulted
12 by as many as six Kitsap Transit employees. Mr. Vasquez described the assault as
13 follows:

14 At this point they were all yelling they were going to rape me. We
15 were still struggling at this point and the driver who had my head unzipped
16 his pants. He said "You're going to give me a blow job. And you are going
17 to do a good job. Otherwise we're going to break every bone in your body." Then I screamed at him "You bastards just fucked up. You made the biggest
18 mistake of your life. From here on out, you're dead meat. You are going to
19 have to kill me. Because we are not getting out of here this easy." The same
20 man told me "We are going to hurt you bad." Then someone started
fingering my ass. My pants were still on and they were jamming their hand
into my butt. At the same time this guy holding my head peeled out his
dick. I said "Hey bring it over here. I'll bite the bastard off and you will
never get it back. You will be a dickless fag. If you're going to do it, do it.

21 ¹ Mr. Vasquez testified in his deposition that he attempted to give the Report to Mr.
22 Johnsen in 2003 or 2004, but that Mr. Johnsen threw it back at Mr. Vasquez. Dkt. 46-2 at 20. Mr.
23 Vasquez also maintains that he provided this report to Jeffrey Sullivan, U.S. Attorney for the
24 Western District of Washington, and that he spoke personally to Mr. Sullivan about the Report
25 on three or four occasions. *Id.* at 22. Mr. Johnsen denies that Mr. Vasquez ever tried to give him
the Report, and stated in his declaration that he had not seen the Report prior to its production in
litigation. Dkt. 49 at 4. Defendants maintain that Mr. Vasquez has not attempted to provide the
Report to anyone at Kitsap Transit before he produced it in discovery in 2006. Dkt. 45, 7-8.
26 Kitsap Transit further denies that it had been previously aware of most of Mr. Vasquez's specific
27 allegations contained in the Report prior to discovery in 2006. In any event, in light of Mr.
28 Vasquez's allegation that Mr. Johnsen threw the Report back at him, the parties appear to agree
that Kitsap Transit never read the Report prior to 2006, and therefore did not know of its
contents until 2006.

1 But you are going to lose. You are going to have to kill me You guys
2 are going to be dead. Before I kill you, I'm going to kill every thing you
 love.

3 *Id.* at 30.

4 In the same report, Mr. Vasquez stated, "I felt like taking my gun and doing some
5 killing. But first I needed to find out just who these pricks are." *Id.* at 31.

6 3. In his June 16 through September 22, 2002, entry, Mr. Vasquez alleged that
7 "groupies" had told him that Kitsap Transit drivers took them to a bus trailer for "orgy
8 sex parties." Mr. Vasquez stated: "The constant presence of these groupies on the bus,
9 their constant complaining to me while driving . . . was done solely for the purpose of
10 harassment and for the benefit of the senior drivers." *Id.* at 35.

11 4. In his July 2002 entry, Mr. Vasquez alleged he was assaulted for a second
12 time, this time by two Kitsap Transit employees, Don Remley and Fred Rupp. *Id.* at 37.

13 5. In one of his September 2002 entries, Mr. Vasquez claimed that he was in
14 the restroom when the door opened and in walked the South Base Transit Supervisor,
15 Dave Cole. "His pants were at his ankles. He had his thumb in his mouth as he shuffled
16 in." Mr. Vasquez then wrote, "From that point on I do believe that this homosexual
17 supervisor has gone out of his way to harass me and sabotage my work." *Id.* at 40.

18 6. At his deposition, Mr. Vasquez testified that his August 13, 2004, entry,
19 which is not included in the record, referenced a violent assault on a Kitsap Transit
20 janitorial employee named Wendy by two Kitsap Transit mechanics named "Curt" and
21 "Henry." Dkt. 46-2, 24-26. He described the event as follows:

22 She's screaming for help. Off the top of my head, she said someone
23 help me, and started crying for God, and she was crying. He was – she
24 asked Jesus to save her, cussed those guys out, don't touch me, you
 bastards. Her bra had been pulled up along with her shirt, her breasts were
 hanging out, her pants were down, halfway down her thighs, her panties
 were down, she had big scratch marks on her buttocks.

25 *Id.*, 24-25.

26 Mr. Vasquez maintains that Kitsap Transit never properly investigated any
27 of his claims.

1 After the deposition, Mr. Johnsen, the Kitsap Transit Human Resources Director,
2 met with the female employee described as the victim by Mr. Vasquez. Dkt. 49 at 4.
3 According to Mr. Johnsen, this employee denied that the incident ever occurred. In
4 addition, she expressed shock that Mr. Vasquez would make such allegations, and stated
5 that Mr. Vasquez did not know her personally. The employee allegedly resigned “within
6 days” because she “no longer felt comfortable working at Kitsap Transit.” *Id.*

7 After learning about Mr. Vasquez’s assault allegations in August 2005, which
8 Defendants maintain were not substantiated, Kitsap Transit decided to review Mr.
9 Vasquez’s October 2001 application for employment. Kitsap Transit wrote to San Jose
10 City College, San Jose/Evergreen Community College, and San Jose State University
11 asking for confirmation of Mr. Vasquez’s attendance. The educational institutions wrote
12 back that they could find no records verifying Mr. Vasquez’s attendance. Dkt. 47-2, 5-9.

13 Mr. Vasquez maintains that he has a vocational certificate from the Department of
14 Commerce, Civil Aeronautics Administration, but could not remember the name of the
15 school. Dkt. 69 at 2 (Declaration of Benito Vasquez). He stated that he “was sure that [he]
16 took classes at both the San Jose City College and San Jose State while attending high
17 school, as well as after. *Id.* Mr. Vasquez further stated that he had no reason to be
18 untruthful about his educational background because education was not a job
19 requirement, and provided copies of his education records. *Id.*, *see also* Dkt. 55-2 (Exhibit
20 C).²

21 **F. Reduction in Hours and Termination of Employment**

22 According to Mr. Vasquez, in January 2006 Kitsap Transit reduced his hours from
23 40 to 30 hours per week. Dkt. 69 at 3 (Declaration of Benito Vasquez). Mr. Vasquez
24 maintains that the proffered reason for this reduction in hours was that he failed to “call in

26 ² Kitsap Transit challenges this evidence because Mr. Vasquez failed to disclose these
27 documents in his initial disclosures, or during discovery. Dkt. 80, 3-4 (*citing* Fed. R. Civ. P. 37).
28 Mr. Vasquez maintains that he did not disclose this information to Kitsap Transit prior to March
5, 2009, because he thought the information was “top secret.” Dkt. 55-2 at 3 (Declaration of
Benito Vasquez).

1 a bid.” *Id.* He states that he was on administrative leave at the time, and did not receive
2 notice of a need to bid. *Id.*

3 On March 1, 2006, Mr. Vasquez received a termination letter from Roy
4 Harrington, Kitsap Transit Operations Director. Dkt. 1 at 4; Dkt. 48-2, 42-43. The letter
5 indicated that Mr. Vasquez would be terminated and that a pre-termination meeting was
6 scheduled for Tuesday, March 7, 2006. *Id.* In the letter, Mr. Harrington wrote to Mr.
7 Vasquez: “The preliminary decision to terminate your employment has been formed after
8 consideration of the information and claims that you have brought forward as part of your
9 litigation against the agency, your union, and three current/former employees.” Mr.
10 Harrington provided the following reasons in support of Kitsap Transit’s decision to
11 terminate Mr. Vasquez’s employment: (1) Mr. Vasquez falsified his employment
12 application by claiming he completed four years of higher education at San Jose
13 Community College and San Jose State University; (2) Mr. Vasquez alleged a myriad of
14 graphic and detailed accusations against co-workers, none of which had been
15 corroborated; (3) Mr. Vasquez’s allegations “slandered the agency’s reputation, cost
16 significant taxpayer dollars in unnecessary litigation defense, and have caused
17 understandable fear and disruption among the agency’s employees”; and (4) Mr.
18 Vasquez’s references to his urges to “kill” or otherwise harm co-workers raised
19 significant safety concerns. *Id.*

20 On March 7, 2006, Mr. Vasquez attended the pre-termination meeting. Dkt. 1 at 5.
21 In his complaint, Mr. Vasquez maintains that, at this meeting, Mr. Harrington stated that
22 Mr. Vasquez was terminated because he filed an EEOC complaint. Dkt. 1 at 5. According
23 to the complaint, Mr. Harrington allegedly held up a copy of Mr. Vasquez’s EEOC
24 complaint and stated that “a major part of the decision to terminate [Mr. Vasquez] was
25 that he filed an EEOC complaint, and the employer was unable to corroborate his

1 allegations.”³ *Id.* Kitsap Transit maintains that Mr. Harrington did not have a copy of, or
2 refer to, Mr. Vasquez’s 2004 EEOC charge during that meeting. Dkt. 45 at 9. Mr.
3 Harrington apparently did point out that Mr. Vasquez had in his Report made allegations
4 of highly offensive conduct and violent assaults by co-workers, none of which Kitsap
5 Transit had substantiated, and that Mr. Vasquez had affirmed under oath in a recent
6 deposition in his federal lawsuit that he had threatened to kill fellow employees who he
7 claimed had attacked him. *Id.*

8 Rita Dilenno, president/business agent of Amalgated Transit Union #1384, was
9 present during this meeting. According to Ms. Dilenno, Kitsap Transit questioned Mr.
10 Vasquez about the contents of his pending civil action and asked him to produce evidence
11 of the issues of the lawsuit. Dkt. 63 (Declaration of Rita Dilenno). Ms. Dilenno maintains
12 that Mr. Harrington “waved a stack of papers in the air while indicating that these were
13 serious charges made by Mr. Vasquez against the employer.” *Id.* at 2. Mr. Harrington
14 allegedly “told Mr. Vasquez that Mr. Vasquez is going to provide proof of his charges at
15 the meeting or otherwise Mr. Vasquez would be terminated.” *Id.* Ms. Dilenno further
16 maintains that Kitsap Transit informed Mr. Vasquez that he was dishonest in disclosing
17 his education background on his application. *Id.*

18 Following this hearing, Kitsap Transit informed Mr. Vasquez that his employment
19 would be terminated effective March 8, 2006. In his complaint, Mr. Vasquez also alleges
20 that “in a letter recalling [the termination meeting], Mr. Harrington states that a major part
21

22 ³ Kitsap Transit maintains that Mr. Vasquez’s deposition testimony contradicts his
23 allegation that Mr. Harrington held up a copy of the EEOC complaint. *See* Dkt. 80 at 2. In his
24 deposition, Mr. Vasquez stated that he “could not give specifics” when asked about the
25 allegation that Mr. Harrington waved a copy of his EEOC complaint. *See* Dkt. 46-2 at 30. At the
26 deposition, Mr. Vasquez was equivocal when asked whether he had a specific memory of Mr.
27 Harrington stating that Mr. Vasquez was being fired because of the EEOC complaint. *Id.*
28 However, Mr. Vasquez states in his declaration, filed on March 24, 2009, that he recalled Mr.
Harrington “specifically stated that I was being terminated because of all the complaints I have
made against Kitsap Transit . . . I recall [Mr. Harrington] actually using the term EEOC .” Dkt.
69 at 4. Kitsap Transit characterizes this declaration as a “sham affidavit” that contradicts Mr.
Vasquez’s deposition testimony.

1 of the decision to terminate the Plaintiff was that he filed an EEOC complaint, and the
2 employer had been unable to corroborate his allegations.” Dkt. 1 at 5. It appears that Mr.
3 Vasquez was referring to the March 8, 2006, letter from Kitsap Transit confirming Mr.
4 Vasquez’s termination. *See* Dkt. 48-2, 45-46 (termination letter). Mr. Harrington makes
5 no express statement in this letter that the termination was based on the EEOC complaint;
6 nowhere in this letter is the EEOC complaint specifically referenced. *Id.* Mr. Harrington
7 does reference sworn statements about “serious incidents . . . that have not been
8 corroborated.” *Id.* at 45.

9 **G. February 2007 EEOC Charge**

10 On February 21, 2007, Mr. Vasquez filed a charge with the Washington State
11 Human Rights Commission and EEOC. Dkt. 81-2 at 2. Mr. Vasquez’s claim read, in its
12 entirety:

13 I filed a charge with EEOC in November 2004. After I filed the
14 complaint, I was fired. At the time I was fired, Roy Harrington told me that
15 my employment was being terminated because I had filed a complaint with
16 the EEOC. I was fired in retaliation for filing a complaint with EEOC,
17 which I believe is in violation of Title VII of the Civil Rights Act of 1964,
18 as amended.

19 *Id.*

20 On July 26, 2007, the EEOC issued a Dismissal and Notice of Rights. Dkt. 70 at 4.

21 **H. The Instant Action**

22 On October 19, 2007, Mr. Vasquez filed a complaint against Defendants. Dkt 1.
23 In his complaint, Mr. Vasquez alleged negligent hiring and negligent supervision because
24 Kitsap Transit had knowledge of Sellars’ history of assault behavior, hired Mr. Sellars,
25 and failed to supervise him. Dkt. 1 at 2-3. Furthermore, Mr. Vasquez alleged that Kitsap
26 Transit created a hostile work environment and subjected Mr. Vasquez to sexual and
27 racial harassment. Dkt. 1 at 3-4. Finally, Mr. Vasquez alleged wrongful termination
28 based on retaliation for pursuing claims under Title VII of the Civil Rights Act of 1964,
29 24 U.S.C. § 000e. Dkt. 1 at 4-5.

1 By Order dated January 24, 2008, the Court dismissed all claims against Kitsap
2 County without prejudice. Dkt. 18. By Order dated February 4, 2008, the Court
3 dismissed Mr. Vasquez's claims against Kitsap Transit of negligent hiring, negligent
4 supervision and hostile work environment. Dkt. 23. Only Mr. Vasquez's wrongful
5 termination claim against Kitsap Transit remains.

6 According to his response to Defendant's motion for summary judgment, Mr.
7 Vasquez claims that the following actions constitute adverse employment actions, which
8 resulted from Kitsap Transit's retaliation for Mr. Vasquez's filing of an EEOC charge and
9 a lawsuit:

10 1. Kitsap Transit placed Mr. Vasquez on administrative leave in September
11 2005.

12 2. Several co-workers obtained protective orders against Mr. Vasquez, also in
13 September 2005.

14 3. Kitsap Transit directed that Mr. Vasquez undergo a phschological
15 evaluation in October 2005.

16 4. Kitsap Transit failed to reinstate Mr. Vasquez from administrative leave
17 upon receipt from the phychologist that Mr. Vasquez "was not a threat."

18 5. Kitsap Transit's issuance of a letter of intent to terminate Mr. Vasquez, and
19 the subsequent employment termination. Dkt. 68, 6-7 (Plaintiff's response to Defendant's
20 motion for summary judgment).⁴

21 **II. DISCUSSION**

22 On January 8, 2009, Defendant Kitsap Transit moved to dismiss Mr. Vasquez's
23 claim for wrongful termination. Dkt. 45.

24
25
26 ⁴ Mr. Vasquez's complaint alleges "wrongful termination," but does not allege any
27 adverse employment action other than his employment termination. *See* Dkt. 1. Kitsap Transit
28 challenges Mr. Vasquez's newly-asserted adverse employment actions, arguing that he failed to
include these in his February 2007 EEOC charge, and that these allegations are not like, or
reasonably related to, the allegations contained in the charge. Dkt. 80 at 5.

1 This motion was originally noted for January 30, 2009, in accordance with Local
2 Rule CR 7(d)(3).

3 Mr. Vasquez initiated this action pro se. On August 7, 2008, attorney Anthony
4 Gambrel filed a declaration seeking a continuance of the trial date on Plaintiff's behalf.
5 Dkt. 42. However, Mr. Gambrel failed to file a notice of appearance in this matter until
6 March 5, 2009, nearly seven months after his August 7, 2008, declaration, and well after
7 the January 30, 2009, noting date.

8 On February 17, 2009, the Court issued an order allowing Mr. Vasquez an
9 opportunity to file a response to Defendant's motion for summary judgment "because
10 Plaintiff is proceeding pro se." Dkt. 50. The Court regarded Mr. Vasquez as proceeding
11 pro se because Mr. Gambrel had not yet filed a notice of appearance. The February 17,
12 2007, order extended the deadline for Mr. Vasquez's response to March 2, 2009. Mr.
13 Vasquez did not meet this deadline.

14 The Court again extended the deadline for responding to the motion for summary
15 judgment to March 20, 2009, which is the date Mr. Gambrel requested in a motion for
16 extension filed March 6, 2009. Dkt. 64. Without explanation, Mr. Gambrel again missed a
17 court deadline, and filed a response to the motion for summary judgment on March 24,
18 2009.⁵ Dkt. 68. However, Mr. Gambrel did submit Rita Dilleno's declaration on March
19 16, 2009. Dkt. 59.

20 Under Local Rule CR 7(b)(2), if a party fails to file papers in opposition to a
21 motion, such failure may be considered by the Court as an admission that the motion has
22 merit. Because Plaintiff failed to meet two extensions granted by the Court, his failure to
23 file a response could be considered an admission that Defendant's motion has merit.

24
25 ⁵ On March 26, 2009, Mr. Gambrel filed a motion for extension, and moved the Court to
26 consider his untimely response. Dkt. 73. Mr. Gambrel stated that the delay in filing the response
27 was due to a medical emergency. *Id.* While the Court sympathizes with Mr. Gambrel's medical
28 issues, it is not clear why these issues precluded Mr. Gambrel from addressing the untimeliness
of his response when he filed the actual response on March 24, 2006. Only after the Court
indicated that it may not consider the untimely response did Mr. Gambrel file his motion for
extension. *See* Dkt. 72.

1 However, the Court has considered the entire record, including Plaintiff's untimely
2 response, and concludes that Plaintiff's claims should be dismissed.

3 **A. Summary Judgment Standard**

4 Summary judgment is proper only if the pleadings, depositions, answers to
5 interrogatories, and admissions on file, together with the affidavits, if any, show that there
6 is no genuine issue as to any material fact and the moving party is entitled to judgment as
7 a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a
8 matter of law when the nonmoving party fails to make a sufficient showing on an
9 essential element of a claim in the case on which the nonmoving party has the burden of
10 proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of
11 fact for trial where the record, taken as a whole, could not lead a rational trier of fact to
12 find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
13 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative
14 evidence, not simply "some metaphysical doubt."). *See also* Fed. R. Civ. P. 56(e).

15 Conversely, a genuine dispute over a material fact exists if there is sufficient
16 evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the
17 differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986);
18 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

19 The determination of the existence of a material fact is often a close question. The
20 Court must consider the substantive evidentiary burden that the nonmoving party must
21 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
22 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
23 issues of controversy in favor of the nonmoving party only when the facts specifically
24 attested by that party contradict facts specifically attested by the moving party. The
25 nonmoving party may not merely state that it will discredit the moving party's evidence at
26 trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec.*
27 *Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, nonspecific

1 statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan*
2 *v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

3 **B. Retaliation**

4 To establish a retaliation claim under Title VII, “a plaintiff must show (1)
5 involvement in a protected activity, (2) an adverse employment action and (3) a causal
6 link between the two.” *Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000)
7 (*citing Payne v. Norwest Corp.*, 113 F.3d 1079 (9th Cir. 1997)). At that point, “the
8 burden of production shifts to the employer to present legitimate reasons for the adverse
9 employment action. Once the employer carries this burden, plaintiff must demonstrate a
10 genuine issue of material fact as to whether the reason advanced by the employer was a
11 pretext. Only then does the case proceed beyond the summary judgment stage.” *Id.*

12 If a plaintiff can show that an illegal consideration was a “motivating factor” in the
13 adverse employment action taken against him, the burden of persuasion shifts to the
14 defendant to show by a preponderance of the evidence that it would have made the “same
15 decision” even if it had not considered the illegal factor. *Price Waterhouse v. Hopkins*,
16 490 U.S. 228, 244-45 (1989). This “same decision” defense applies to retaliation cases.
17 *See Funai v. Brownlee*, 369 F. Supp. 2d 1222, 1228 (D. Hawaii 2004) (“the Ninth Circuit
18 has clearly contemplated the possibility of mixed-motive retaliation claims”) (*citing*
19 *Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1067 (9th Cir. 2003)).

20 Kitsap Transit concedes that Mr. Vasquez engaged in protected activities by filing
21 an EEOC complaint and the 2005 lawsuit, and that his termination constituted an adverse
22 employment action. However, Kitsap Transit maintains that Mr. Vasquez cannot establish
23 a prima facie case of retaliation because he cannot establish a causal connection between
24 the discharge decision and his protected activity. Dkt. 45 at 12. Kitsap Transit further
25 asserts that, even if a prima facie case has been established, Mr. Vasquez’s claim fails
26 because he was terminated for legitimate, non-retaliatory reasons. Dkt. 45 at 15.
27 Defendant also challenges the evidence provided by Mr. Vasquez that Kitsap Transit’s
28 legitimate reasons were pretextual. Dkt. 45 at 20. Finally, Kitsap Transit argues that even

1 if Mr. Vasquez could produce direct evidence that his EEOC charge and Title VII
2 litigation in any way motivated the decision to terminate Mr. Vasquez's employment,
3 Kitsap Transit would still have made the same decision for legitimate reasons. *Id.*, 21-22.

4 **1. Causation**

5 Mr. Vasquez maintains that Rita Dilenno's declaration supports his claim that
6 Kitsap Transit terminated his employment in retaliation for filing the EEOC charge and
7 the lawsuit. Dkt. 68 at 5. Kitsap Transit counters that the only document Mr. Harrington
8 "waved" at the pre-termination meeting was Mr. Vasquez's "Report," and not the EEOC
9 charge. Dkt. 80 at 6.

10 The Court disagrees with Mr. Vasquez's assertion that Ms. Dilenno's declaration
11 provides "direct evidence" that Mr. Vasquez was retaliated against for filing the EEOC
12 charge and lawsuit. While Ms. Dilenno stated in very general terms that Mr. Harrington
13 questioned Mr. Vasquez about the lawsuit, she provided no statements that suggest Mr.
14 Vasquez was fired in retaliation for filing the lawsuit. The Court agrees with Kitsap
15 Transit's assertion that an employer is not prohibited from taking appropriate action when
16 it learns of an employee's misconduct as a result of the EEOC or litigation process. The
17 Court also finds dubious Mr. Vasquez's argument that causation has been established in
18 light of the fact that he was not terminated until March 2006, approximately 16 months
19 after filing the EEOC charge and 7 months after Kitsap Transit was served with Mr.
20 Vasquez's lawsuit. In addition, Mr. Vasquez has failed to provide any evidence of
21 causation for his allegation that he was placed on administrative leave in retaliation for
22 filing the complaint.⁶ While this employment action took place during the 2005 litigation,
23 Kitsap Transit quite clearly reacted in response to Mr. Vasquez's statements concerning

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27 ⁶ In any event, Mr. Vasquez did not allege this "adverse employment action" in his
28 EEOC charge.

1 his urge to kill or otherwise harm co-workers.⁷ Kitsap Transit's decision to order the
2 psychological evaluation was similarly in response to Mr. Vasquez's violent statements.

3 At best, Ms. Dilenno's declaration provides circumstantial evidence in support of
4 Mr. Vasquez's *prima facie* case because of Mr. Harrington's alleged statements
5 concerning Mr. Vasquez's lawsuit. Her statements that Mr. Harrington "waved a stack of
6 papers" may raise a factual issue as to whether Mr. Harrington was waving copies of the
7 EEOC charge or lawsuit complaint, or whether Mr. Harrington was referring to Mr.
8 Vasquez's "Report." However, as discussed below, Kitsap Transit had legitimate, non-
9 retaliatory reasons for terminating Mr. Vasquez's employment.

10 In addition, for purposes of deciding this motion, the Court has considered Mr.
11 Vasquez's statement that Mr. Harrington told him that he was being terminated because
12 "of all the complaints [Mr. Vasquez] had made against Kitsap Transit." Dkt. 69, 1-4.⁸ The
13 Court notes that, while Mr. Vasquez now states that Mr. Harrington used the term
14 "EEOC," Mr. Vasquez does not state in his recent declaration that Mr. Harrington
15 "waved" the EEOC complaint. Nor does he now maintain that Mr. Harrington stated that
16 the EEOC complaint was the reason for Mr. Vasquez's termination. Rather, Mr.
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18 ⁷ Mr. Vasquez's contention that co-workers' decisions to obtain protective orders
19 constitutes an adverse employment action merits little discussion. It would be irresponsible for
20 this Court to discourage employers from informing employees about threats made against them
21 by a co-worker, unless an employer had compelling evidence proving that the allegations of
22 threats were false. Here, an employee's decision to seek a protective order cannot be considered
23 an adverse employment action on the part of the employer.

24 ⁸ Whether Mr. Vasquez's affidavit (Dkt. 69, 1-4) constitutes a "sham affidavit" is a close
25 question. In the Ninth Circuit, a district court may not disregard a declaration unless it has first
26 made a factual determination that the affidavit is a "sham." *Kennedy v. Allied Mut. Ins. Co.*, 952
27 F.2d 262, 266 (9th Cir. 1991). A "sham" affidavit is one that "flatly contradicts" earlier
28 testimony. *Id.* However, it appears that Mr. Vasquez's affidavit did not "flatly contradict" the
deposition testimony because he did not state that Mr. Harrington actually waved the EEOC
complaint during the pre-termination meeting. Rather, he indicated that Mr. Harrington used the
term "EEOC" at "one point" during the meeting. *Id.* Although wavering during the deposition,
Mr. Vasquez does state at one point that Mr. Harrington mentioned the EEOC complaint.
See Dkt. 46-2 at 31:126 ("[Mr. Harrington] says, your complaint – I'm not talking about holding
up like this (indicating). Your complaint with the EEOC").

1 Harrington allegedly stated that Mr. Vasquez was being fired for “all the complaints”
2 made against Kitsap Transit. Mr. Vasquez’s complaints against Kitsap Transit, which
3 include those made in his “Report,” go beyond the contents of the EEOC charge and his
4 Title VII claims, and include the unsubstantiated and controverted allegation of a sexual
5 assault against Wendy, the janitorial employee, among other unsubstantiated claims. The
6 Report also included the violent statements about his urges to kill or otherwise harm co-
7 workers.

8 Viewing this case in the light most favorable to Plaintiff, the Court concludes that
9 Mr. Vasquez has established a prima facie case for purposes of this order only.

10 **2. Employer’s Proffered Reasons for Terminating Plaintiff’s Employment**

11 Kitsap Transit has provided legitimate, non-retaliatory reasons for terminating Mr.
12 Vasquez’s employment. Mr. Vasquez argues that Kitsap Transit “exaggerated” his
13 statements concerning his urges to kill or otherwise harm co-workers. He argues that “it is
14 difficult to conceptualize that the Employer’s actions with regard to the alleged threat to
15 other employees is anything but retaliation.” Dkt. 68 at 11. Mr. Vasquez goes so far as to
16 suggest that Mr. Vasquez’s statements are protected activities merely because he made
17 these statements in relation to his lawsuit, without citing any authority for this
18 proposition. *Id.* Mr. Vasquez’s arguments are unpersuasive.

19 Kitsap Transit did not “exaggerate” Mr. Vasquez’s statements.⁹ Mr. Vasquez does
20 not deny making the following statements during the 2005 litigation and in his “Report”:
21 “My first inclination was to go home, get my gun, and do some killing,” and “Before I
22 kill you, I’m going to kill everything you love.” The seriousness of these statements is not
23 diminished by Mr. Vasquez’s assertion that he was merely expressing his thoughts as of
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25 ⁹ Mr. Vasquez cites *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185 (9th
26 Cir. 2003), in support of his argument that Kitsap Transit exaggerated his violent statements.
27 *Raad* is inapposite. In *Raad*, the employer misunderstood the employee’s statement that she did
28 not want to “blow up,” meaning that she was angry, as a threat to “blow up” a building. This is
quite different than Mr. Vasquez’s statement that he wanted to go home, get his gun, and “do
some killing.”

1 the time he was allegedly attacked. Kitsap Transit cannot be expected to be assured that
2 Mr. Vasquez did not pose a threat simply because he now states that he did not intend to
3 harm anyone. In addition, Kitsap Transit cannot be expected to gamble its employees'
4 safety on the likelihood of Mr. Vasquez acting on his statements by relying upon one
5 psychologist's opinion that Mr. Vasquez would not likely become aggressive.

6 The Court also agrees with Kitsap Transit's argument that "Mr. Vasquez's Report
7 of alleged atrocities and expressed desire to commit violence against fellow workers are
8 distinct and separable from his protected pursuit of an EEOC charge and Title VII
9 claims." Dkt. 80 at 7.

10 In sum, an employer cannot be discouraged from reacting to an employee who
11 makes violent threats against other individuals, nor should an employer ignore threats
12 made by an employee simply because that employee has filed an EEOC charge or lawsuit.
13 Kitsap Transit acted appropriately to protect the safety of its employees.

14 Kitsap Transit offered additional legitimate, non-retaliatory reasons in support of
15 its decision to terminate Mr. Vasquez's employment. First, Kitsap Transit determined that
16 Mr. Vasquez had been untruthful on his employment application regarding his
17 educational background. While Mr. Vasquez has now provided documentation in support
18 of his argument that he was not untruthful on his application, he did not provide this when
19 he had an opportunity to do so during the pre-termination meeting. Mr. Vasquez admits in
20 his declaration that he did not provide this information prior to March 5, 2009, because he
21 deemed the information confidential. Even assuming Kitsap Transit was incorrect in
22 determining that Mr. Vasquez was untruthful about his educational background, it did not
23 make this determination in order to proffer a "phony reason" to terminate Mr. Vasquez.

24 *See Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995) (pretext does not simply
25 mean a "mistake," but rather "a lie, specifically a phony reason for some action"). Kitsap
26 Transit acted appropriately in seeking to determine whether Mr. Vasquez had lied about
27 his employment because Mr. Vasquez had made a series of inflammatory, unsubstantiated,
28 and controverted accusations. In addition, Kitsap Transit received information from

1 educational institutions that Mr. Vasquez had never been a student at the institutions he
2 claimed to have attended.

3 Second, Mr. Vasquez's repeated accusations of outrageous and violent conduct on
4 the part of co-workers had disturbed the workplace, caused employees to obtain
5 restraining orders, and may have caused some employees to resign from Kitsap Transit.
6 Mr. Vasquez has not provided any evidence beyond his own assertions to substantiate any
7 of these claims. With regard to allegations that other employees had been harassed, Mr.
8 Vasquez offers no corroborating evidence that any employee claimed to have been
9 harassed. His claim that an employee was attacked was refuted by the alleged victim. Mr.
10 Vasquez has not offered a single piece of evidence in support of any of his allegations.
11 Mr. Vasquez also subjected the employer and employees to an investigation by the Kitsap
12 County Sheriff's Office, which found no evidence of wrongdoing. Kitsap Transit acted
13 reasonably in determining that none of Mr. Vasquez's accusations had merit. It also had
14 overwhelming evidence that Mr. Vasquez engaged in a pattern of deception from the time
15 he completed his employment application through numerous allegations that Kitsap
16 Transit was justified in finding were untrue.

17 **3. Pretext**

18 Mr. Vasquez fails to demonstrate that Kitsap Transit's proffered reasons for
19 terminating his employment were pretext for a retaliatory motive. Even if Ms. Dilenno's
20 declaration did provide evidence of a retaliatory motive, Kitsap Transit had independent,
21 legitimate reasons for terminating Mr. Vasquez's employment.

22 Mr. Vasquez has stated that Mr. Harrington suggested that he was being
23 terminated based in part on the EEOC charge. However, the Court concludes that, as a
24 matter of law, Kitsap Transit proffered legitimate, non-retaliatory, and independent
25 reasons for terminating Mr. Vasquez's employment. Most importantly, Kitsap Transit
26 reacted to ensure the safety of the workplace. If Mr. Vasquez had not filed an EEOC
27 complaint or lawsuit, or otherwise engaged in protected activity, there is no question that

1 Kitsap Transit's interest in not tolerating explicit threats to its employees constituted an
2 independent basis upon which to terminate Mr. Vasquez's employment.

3 With regard to the other reasons for Mr. Vasquez's termination, the Court finds no
4 evidence of pretext for the reasons discussed in Section (2) above.

5 **III. SANCTIONS**

6 The Court may order monetary sanctions against an attorney who fails to comply
7 with a scheduling or pretrial order. Fed. R. Civ. P. 16(f). Any sanction must be
8 "proportionate to the offense and commensurate with principles of restraint and dignity
9 inherent in judicial power." *Zambrano v. City of Tustin*, 885 F.2d 1473, 1479-80. The
10 sanctionable conduct must amount to "recklessness, gross negligence, repeated – although
11 unintentional – flouting of court rules, or willful misconduct." *Id.*

12 On March 17, 2009, the Court issued an order to show cause regarding the issue of
13 whether Plaintiff should reimburse Defendant for costs associated with responding to
14 Plaintiff's motions. Dkt. 64. Specifically, the Court ordered Mr. Gambrel to show cause
15 as to why he should not reimburse Kitsap Transit for the following: (1) the costs of
16 responding to Mr. Gambrel's motion for extension of time to respond to Defendant's
17 motion for summary judgment; (2) the costs of filing a surreply on the same motion; and
18 (3) the costs of filing a reply regarding the motion for summary judgment. *Id.* at 4.

19 Mr. Gambrel states that "he does not dispute . . . [that] he should be sanctioned for
20 the additional costs incurred by the Defendant in that it would be inequitable for the
21 Defendant to absorb the costs when it has not caused any delays." Dkt. 73 at 4. Kitsap
22 Transit responded with a declaration of costs. Dkt. 78.

23 Plaintiff's counsel has engaged in a pattern of missing deadlines, causing delay,
24 and prejudicing Kitsap Transit by forcing it to incur legal costs. As a result, the Court
25 delayed consideration of Kitsap Transit's motion for summary judgment for more than
26 two months.

27 As indicated in the Court's March 17, 2009, order, Mr. Gambrel failed to
28 demonstrate excusable neglect for his failure to meet the January 30, 2009, or the March

1 2, 2009, deadlines for responding to Defendant's motion for summary judgment. First,
2 while the Court does not fault Mr. Gambrel for medical problems, the Court finds
3 questionable Mr. Gambrel's explanation for his failure to respond to the summary
4 judgment motion. Not only did Mr. Gambrel fail to respond or request additional time to
5 respond prior to the January 30, 2009, noting date, he also missed the March 2, 2009,
6 extension the Court granted *sua sponte*. The Court also notes that Mr. Gambrel again
7 missed a deadline by failing to respond or to request an extension for the March 24, 2009,
8 deadline (the third extension). *See supra* at 12, footnote 5. All of the court's orders, as
9 well as the Defendant's motion, were posted on the electronic docket. Additionally,
10 Defendants served both Mr. Vasquez and Mr. Gambrel with its motion for summary
11 judgment. *See* Dkt. 45 at 24 (certificate of service); Dkt. 55-3 (declaration of Alexander
12 Gambrel). Mr. Gambrel failed to offer a plausible explanation for failing to respond in
13 any manner prior to March 6, 2009.

14 The Court also finds questionable Mr. Gambrel's statement that he did not file a
15 notice of appearance in this matter until March 5, 2009, because Mr. Vasquez did not
16 provide him with a copy of the Court order continuing the trial date. *See* Dkt. 60
17 (Plaintiff's reply). Even if the Court were to accept this explanation, Mr. Gambrel states
18 that in September 2008, he did find out that the matter was continued. *Id.* at 1. Mr.
19 Gambrel went on to represent Mr. Vasquez during depositions, yet did not file an
20 appearance until March 5, 2009.

21 The Court concludes that Plaintiff's counsel should reimburse Kitsap Transit for
22 the costs associated with responding to Plaintiff's motion to allow more time to respond
23 to Kitsap Transit's motion for summary judgment (Dkt. 55). In addition, counsel should
24 reimburse Kitsap Transit for the costs of filing a surreply, because Mr. Gambrel raised
25 issues in his reply that should have been raised in his initial motion. *See* Local Civil Rule
26 7(g). However, because the Court considered Plaintiff's response, and found Kitsap
27 Transit's reply to be useful in deciding its motion for summary judgment, Mr. Gambrel
28 should not be required to reimburse Kitsap Transit for the costs of preparing the reply.

1 Kitsap Transit asserts that the cost of research and preparing materials to respond
2 to Plaintiff's motion for additional time to respond to the motion for summary judgment
3 amounts to \$2115.00 in fees, for 9 hours of work. It asserts that the costs of preparing the
4 surreply amounts to \$705.00, for 3 hours of work. The Court finds that 5 hours for
5 preparation of both briefs, at the rate of \$235 per hour, to be reasonable. Accordingly,
6 Plaintiff's counsel is ordered to make payment of \$1,175.00 to Kitsap Transit.

7

8 **IV. ORDER**

9 Therefore, it is hereby **ORDERED** that:

10 1. Plaintiff's motion for extension of time to respond to Defendant's motion
11 for summary judgment (Dkt. 73) is **GRANTED**;

12 2. Defendants' motion for summary judgment (Dkt. 45) is **GRANTED** and
13 Plaintiff's remaining claim for wrongful termination is **DISMISSED with prejudice**;

14 3. Plaintiff's second motion to continue trial (Dkt. 75) is **STRICKEN** as
15 moot; and

16 4. Plaintiff's counsel is ordered to make payment of \$1,175.00 to Defendant
17 Kitsap Transit as stated herein.

18 DATED this 10th day of April, 2009.

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BENJAMIN H. SETTLE
United States District Judge